INTERIOR BOARD OF INDIAN APPEALS

Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs

28 IBIA 247 (10/25/1995)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

WYANDOTTE TRIBE OF OKLAHOMA
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-79-A Decided October 25, 1995

Appeal from a determination that the Wyandotte Tribe of Oklahoma was not entitled to the transfer of excess Federal real property located in Kansas City, Kansas.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Constitutional Law: Generally

   The Board of Indian Appeals lacks authority to declare an act of Congress unconstitutional.

2. Federal Property and Administrative Services Act--Government Property--Indians: Generally--Surplus Property

   The proviso in 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Oklahoma Indian tribes, applies only to property within the State of Oklahoma.

3. Federal Property and Administrative Services Act--Government Property--Indians: Reservations: Generally--Surplus Property

   The main part of 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Indian tribes, applies to such property located within a current Indian reservation.

APPEARANCES: Michael Minnis, Esq., and David McCullough, Esq., Oklahoma City, Oklahoma, for appellant; Alan R. Woodcock, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Wyandotte Tribe of Oklahoma seeks review of a January 27, 1995, decision of the Muskogee Area Director, Bureau of Indian Affairs (BIA), concluding that appellant was not eligible to receive excess Federal real property located in Kansas City, Kansas. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On April 20, 1994, the General Services Administration (GSA) notified the Anadarko Area Director, BIA, that the former United States Post Office and Courthouse, located on 2.04 acres of land at 812 North 7th St., Kansas City, Kansas (GSA Control #7-G-KS-0514), had been declared excess to the needs of the Federal Government (Kansas property). GSA requested advice from the Anadarko Area Director on whether the property met the criteria of P.L. 93-599, 40 U.S.C. § 483(a)(2) (1994), 1/ under which certain excess Federal real property is to be transferred to the Secretary of the Interior (Secretary) to be held in trust for an Indian tribe.

On May 3, 1994, the Anadarko Area Director advised GSA that the property did not qualify for transfer.

In a January 12, 1995, letter to the Muskogee Area Director (hereafter Area Director), GSA informed the Area Director of the position taken by the Anadarko Area Director and of an October 31, 1994, contact by appellant who stated that the Kansas property qualified for transfer to it because a cemetery across the street from the Kansas property was held in trust for it. GSA asked for further advice from the Area Director. On January 18, 1995, appellant asked the Area Director to join in its request to GSA for transfer of the Kansas property.

By letter dated January 27, 1995, the Area Director informed appellant of his conclusion that the Kansas property did not qualify for transfer. Appellant brought this appeal. Briefs were filed by appellant and the Area Director. 2/ GSA and the Area Director have requested expedited consideration. Expedited consideration is granted.

Discussion and Conclusions

This case is governed by 40 U.S.C. § 483(a)(2) which provides:

> The Administrator [of GSA] shall prescribe such procedures as may be necessary in order to transfer without compensation to the Secretary of the Interior excess real property

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1/ Unless otherwise indicated, all further citations to the United States Code are to the 1994 edition.

2/ On Sept. 26, 1995, after it had begun consideration of this case, the Board received a letter from Janith English, who identified herself as the Second Chief of the Wyandot Nation of Kansas. The Wyandot Nation of Kansas is not presently a Federally recognized Indian tribe (see 58 FR 54364, 54368 (Oct. 21, 1993)), although the Board has been informed by BIA that an acknowledgment petition is pending. English stated that the Wyandot Nation of Kansas opposed appellant's position in this appeal.

In addition to being untimely, the letter was not served on any of the parties to the appeal. The Board has not considered this letter in reaching its decision.

> located within the reservation of any group, band, or tribe of Indians which is recognized as eligible for services by the Bureau of Indian Affairs. Such excess real property shall be held in trust by the Secretary for the benefit and use of the group, band, or tribe of Indians, within whose reservation such excess real property is located: Provided, That such transfers of real property within the State of Oklahoma shall be made to the Secretary of the Interior to be held in trust for Oklahoma Indian tribes recognized by the Secretary of the Interior when such real property (1) is located within boundaries of former reservations in Oklahoma as defined by the Secretary of Interior and when such real property was held in trust by the United States for an Indian tribe at the time of acquisition by the United States, or (2) is contiguous to real property presently held in trust by the United States for an Oklahoma Indian tribe and was at any time held in trust by the United States for an Indian tribe.

As an initial matter, although appellant spends a considerable amount of time showing that it is a "tribe of Indians which is recognized as eligible for services by the [BIA]," there is no dispute on this point. See 58 FR 54364, 54368 (Oct. 21, 1993).

On its face, section 483(a)(2) appears clear. The main part of the section appears to require that excess Federal property located within the reservation of an Indian tribe be transferred to that tribe. When excess Federal property is located in the State of Oklahoma, the proviso apparently requires that the property be transferred to an appropriate Indian tribe if it is located within the boundaries of a former reservation or is contiguous to land presently held in trust, and meets the specified requirements for having previously been held in trust.

Citing the general rule that "[d]oubtful expressions [in legislation affecting Indians] are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith," (Carpenter v. Shaw, 280 U.S. 363, 367 (1930)), and the legislative history of H.R. 8958, the bill which was enacted as section 483(a)(2), appellant argues that this reading of the statute is incorrect. Although the statute appears unambiguous, the Board is mindful of the Supreme Court's admonition that

> "[t]he starting point in every case involving construction of a statute is the language itself." But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. * * * This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." * * * The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect. [Citations omitted.]

Watt v. Alaska, 451 U.S. 259, 265-66 (1981). Accordingly, the Board will review the legislative history of H.R. 8958, as appellant requests.

Appellant contends that S. Rep. No. 1324, 93d Cong., 2nd Sess. (1974) (S. Rep. 1324), reprinted in 1974 U.S. Code Cong. & Admin. News 7130, shows that Congress intended the proviso to extend "the same" authority to transfer excess Federal property within the State of Oklahoma as was given under the main part of the section in regard to excess Federal property located in other states. Appellant argues that an equal protection issue would be raised by any interpretation of the statute which would result in different transferral authority when excess Federal property was located in Oklahoma than when it was located in any of the other states.

[1] As part of the Executive Branch of Government, the Board lacks authority to declare an act of Congress unconstitutional. See, e.g., Estate of Annie Greencrow Whitehorse, 27 IBIA 136 (1995), and cases cited therein; Ottawa Indian Tribe of Oklahoma v. Muskogee Area Director, 24 IBIA 92, 98 n.9 (1993), and cases cited therein. The Board accordingly proceeds with its review of this matter under the assumption that the statute is constitutional. To the extent appellant believes the statute, either on its face or as interpreted here, is unconstitutional on equal protection grounds, it may raise that issue in Federal court.

Appellant argues that it is entitled to receive the Kansas property under both the main part and the proviso in section 483(a)(2). Appellant contends that the property should be transferred to it under the main part of the section because the property is located within its Kansas reservation, the boundaries of which have never been extinguished; and under the proviso because the property "is located within the boundaries of the former Wyandotte Reservation and was held in trust by the United States for an Oklahoma Indian Tribe or, is contiguous to real property presently held in trust that was at any time held in trust by the United States for the Wyandotte" (Reply Brief at 4; emphasis in original).

The Board first addresses appellant's argument that the Kansas property should be transferred to it under the proviso in section 483(a)(2). On its face, the proviso applies only in the State of Oklahoma. Appellant admits that the proviso was added in the belief--alleged by appellant to be mistaken--that the status of Indian lands in Oklahoma was unique (Opening Brief at 7; Reply Brief at 1, 5). The Board recently had occasion to note that “Indian reservations in Oklahoma have generally been presumed, whether rightly or wrongly, to have been terminated by the statutes which opened them to non-Indian settlement.” Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, 28 IBIA 169, 185 (1995). See also Cohen's Handbook of Federal Indian Law 775-76 (1982 ed.) (Cohen's Handbook).

Congressional belief in the uniqueness of the status of Indian lands in Oklahoma is clearly shown in the legislative history of H.R. 8958. As introduced in the House, the bill did not mention Oklahoma. The proviso

was added as an amendment by the Senate. As passed by the Senate, the proviso read:

> Provided, That such transfers shall be made to Oklahoma Indian tribes recognized by the Secretary of the Interior when such land (1) is located within the boundaries of former reservations in Oklahoma as defined by the Secretary of the Interior and when such land was held in trust by the United States for an Indian tribe at the time of the acquisition by the United States, or (2) is contiguous to land presently held in trust by the United States for an Oklahoma Indian tribe and was at any time held in trust by the United States for an Indian tribe.

120 Cong. Rec. 39398 and 40176 (1974).

As explained in S. Rep. 1324 at page 1,

> [t]he [Senate] Committee amendment to H.R. 8958 adds a provision that will extend the same disposal authority for excess lands in Oklahoma that is provided by the bill for the rest of the United States. This provision is necessitated by the fact that there are no reservations in Oklahoma. Without the proviso added by this amendment the authority granted by H.R. 8958 would have no applicability to Oklahoma. The amendment provides for transfers of excess public land to Oklahoma tribes if such land is located within the boundaries of former reservations in Oklahoma as defined by the Secretary of the Interior if such land was held in trust by the United States for a recognized Indian tribe at the time of its acquisition, or if the land is contiguous to land held in trust for an Oklahoma tribe and at any time in its history was held in trust by the United States for an Indian tribe.

1974 U.S. Code Cong. &: Admin. News at 7130. See also 120 Cong. Rec. 39398 (1974).

During House floor debates on H.R. 8958 following the passage of the Senate amendment, Representative Brooks stated:

> During Senate consideration of the bill, a question arose as to whether Oklahoma Indian tribes were excluded from its provisions. Apparently, the word "reservation" is not used with regard to Oklahoma Indian lands even though many tribal lands are held in trust by the Secretary of the Interior in circumstances analogous to "reservations" in all other States.
>
> The Senate Government Operations Committee adopted an amendment to make certain that Oklahoma Indians were included in the bill as was intended. I wholeheartedly support the objective of that amendment.

> There is a technical problem with the language, however. The Senate amendment may be interpreted to authorize these transfers directly to the Oklahoma Indian tribes. In the provisions applicable to all other Indian tribes the transfers would he to the Secretary of the Interior to hold in trust for the Indian tribe. The additional amendment I am offering to the Senate amendment would correct that inadvertent inconsistency.

120 Cong. Rec. 40176 (1974). The House amendment to the Senate amendment contained the present language of section 483(a)(2), and was approved by both the House and the Senate.

In construing legislation, the primary goal is to ascertain the intent of Congress. Appellant admits, and the legislative history clearly demonstrates, that Congress added the proviso based on the belief that the status of Indian lands in Oklahoma was different, and that, without the proviso, the statute would not apply to excess Federal property located in Oklahoma, and would therefore unintentionally disadvantage Oklahoma tribes.

Appellant contends that "[i]f [the status of Indian lands in] Oklahoma is not unique, [Congress'] erroneous assumption should not be the basis for construing the statute to narrow the rights intended to be granted to Indian tribes regardless of the state where their lands are located" (Opening Brief at 7). Appellant basically asks the Board to read Congressional belief in the uniqueness of the status of Indian lands in Oklahoma out of the legislation, by deleting the words "within the State of Oklahoma" and "in Oklahoma" from the proviso. In essence, appellant contends that Congress was incorrect in believing that "former reservations" existed only in Oklahoma, and that, had Congress been properly informed, it would have applied the rules established in the proviso to all states. 3/

3/ This is part of appellant's argument for an "expansive" reading of section 483(a)(2). At page 7 of its Opening Brief, appellant states: "The [Senate] Committee amendment was not intended to narrow the disposal authority but to emphasize how broadly the legislators intended its reach." See also Opening Brief at 4 and 6; Reply Brief at 4. Appellant's proposed expansive reading of the section, which, if carried to its logical conclusion, would appear to authorize the transfer of property anywhere in the United States which had at some time been held in trust for an Indian tribe (or perhaps only land anywhere in the United States which had at some time been held in trust for an Oklahoma Indian tribe), regardless of the property's present status, appears to be at odds with a statement made by Representative Stanton when H.R. 8958 was first reported out of committee in the House: "Mr. Speaker, the original legislation that was introduced was much more extensive and would have authorized the conveyance of surplus Government property located outside Indian reservations to Indian tribes. The Government Operations Committee amended the bill to delete that provision

[2] The Board declines the invitation to rewrite section 483(a)(2). Whether or not Congress was correct as a matter of law in believing that the status of Indian lands in Oklahoma was different than in other states, the Board concludes that the legislative history clearly shows that Congress added the proviso with the intent of ensuring that the section would apply to excess Federal property located in Oklahoma, and intended the proviso to apply only in Oklahoma. This intent is expressed in the plain language of the proviso. The Board also concludes that, when read in context, the Senate report's reference to "the same" disposal authority refers to Congress' intention that excess Federal property located in Oklahoma, although perhaps technically not on a "reservation," would, under the enumerated circumstances, be transferred to appropriate Oklahoma tribes, in the same way that excess Federal property located on reservations in other states would be transferred to the tribe on whose reservation the excess property was located. See Seneca-Cayuga Tribe of Oklahoma v. Deputy Assistant Secretary--Indian Affairs, 10 IBIA 90, 99, 89 I.D. 441, 446 (1-982).

Accordingly, because the Kansas property is not located in Oklahoma, the Board rejects appellant's arguments that it is eligible to receive the property under either part of the proviso of section 483(a)(2).

Appellant also contends that it is eligible to receive the Kansas property under the main part of section 483(a)(2). Appellant argues that it has a reservation in Kansas whose boundaries have never been extinguished, and that the Kansas property is located within that reservation. In order to address this argument, the Board first examines the history of appellant's land holdings in Kansas.

By treaty dated March 17, 1842, 11 Stat. 581, the Wyandottes 4/ ceded to the United States all of their remaining lands in Ohio and Michigan, in return for certain payments and a reservation of 148,000 acres west of the Mississippi River. 5/ In 1843, following the failure of the United States

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fn. 3 (continued)
because we were concerned about extending special treatment to any particular group of people. The committee amended the bill to cover only lands located within the boundaries of the reservations." 120 Cong. Rec. 36249 (1974).

4/ The spelling of Wyandotte has changed over the years. For consistency, the Board uses only the spelling of the name currently used by appellant.

The Wyandottes were signatories to several treaties predating 1842. However, because those treaties did not involve lands located in Kansas, they are not relevant to this appeal.

5/ The value of the lands ceded to the United States by the Wyandottes in treaties culminating in and including the 1842 Treaty was the subject of six claims before the Indian Claims Commission. See Docket 120, 31 Ind. Cl. Comm. 222 (1973); Docket 139, 30 Ind. Cl. Comm. 8 (1973); Docket 140, 30 Ind. Cl. Comm. 388 (1973); Docket 141, 30 Ind. Cl. Comm. 337 (1973); and Dockets 212 and 213, 38 Ind. Cl. Comm. 561 (1976).

to provide the promised reservation, the Wyandottes entered into an agreement with the Delaware Nation, then residing in Kansas, to acquire 39 sections of land (3 by donation and 36 by purchase), each containing 640 acres, for the sum of $46,080. This agreement was confirmed by a Joint Resolution of Congress on July 25, 1848. 9 Stat. 337, No. 19.

By treaty of April 1, 1850, 9 Stat. 987, the United States acknowledged its failure to provide the reservation promised in 1842, and the Wyandottes relinquished their treaty claim to 148,000 acres for a payment of $185,000, or $1.25 per acre.

Article 1 of a treaty entered into on January 31, 1855, 10 Stat. 1159, provided that the Wyandottes would dissolve their tribal relations and become citizens of the United States. Under Article 2, the Wyandottes ceded to the United States all their right, title, and interest in the tract purchased from the Delawares in 1843. This property was to be reconveyed to the individual tribal members in fee simple. 6/ As relevant to this appeal, a tract of land used as a burial ground, and now known as the Huron Cemetery, was exempted from the cession and was to be permanently reserved for cemetery purposes. Under Article 6, the Wyandottes relinquished all claims based on former treaty obligations of the United States, in consideration of a monetary payment. 7/

After the Civil War, certain Wyandottes were allowed to resume tribal relations on land in Oklahoma which had been ceded to the United States by the Senecas. 15 Stat. 513, 516-17.

A 1906 appropriations act authorized the Secretary to sell the Huron Cemetery and to provide for the removal and reinterment of those persons buried there. 34 Stat. 325, 348-49. This authority was litigated in Conley v. Ballinger, 216 U.S. 84 (1910), before being repealed by the Act of February 13, 1913, 37 Stat. 668, without having been exercised.

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6/ Under Article 4, competent members were to receive their patents in “absolute and unconditional fee simple,”and members deemed incompetent were to receive patents with certain restrictions on alienation. By Article XV of the Treaty of Feb. 23, 1867, 15 Stat. 513, 517, restrictions on the sale of lands assigned to incompetent members were removed. See Schrimpscher v. Stockton, 183 U.S. 290 (1902).

7/ Appellant states at page 15 of its Opening Brief that "the reservation lands (with certain exceptions, including the Huron Cemetery) were allotted to individual Wyandotte tribal members who over the next hundred years may have sold off most if not all of the land to persons who were not members of the tribe" (footnotes omitted). The allotment of the lands to tribal members was also noted in City of Kansas City, Kansas v. United States, 192 F. Supp. 179, 181 (D. Kan. 1960): "All lands ceded to the United States were subsequently allotted to individual Indians qualified to receive them, except so far as material here Allotment Number 282, the Huron Place Cemetery, the subject of this litigation."

In 1956, as part of an attempt to terminate Federal supervision over appellant, Congress again authorized the sale of the Huron Cemetery. Act of August 1, 1956, ch. 843, 70 Stat. 893, 25 U.S.C. § 795(c) (1958). This authorization was litigated in Kansas City, Kansas, supra. In 1978, Congress repealed the authorization and confirmed that appellant had not been terminated. Act of May 15, 1978, P.L. 95-281, 92 Stat. 246, 25 U.S.C. §§ 861-861c. The Huron Cemetery is still held in trust by the United States. 8/

Appellant does not contend that the United States currently holds any land in Kansas in trust for it or its members, other than the Huron Cemetery. It argues, however, that it nonetheless has a reservation in Kansas, apparently consisting of the tract purchased from the Delawares.

Appellant first contends that the tract meets the definition of "reservation" in 25 CFR 151.2(f). 9/ 25 CFR Part 151 applies to acquisitions of land in trust for an Indian tribe or individual. Section 151.2(f) provides:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, "Indian reservation" means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the secretary.

Although appellant argues in its opening brief that this definition should be applied, it does not attempt to show how any lands in Kansas constitute its reservation under the definition. The Area Director replies that appellant failed to show that the United States recognized it "as having governmental jurisdiction over either the subject property or any land in Kansas, with the possible exception of the Huron Cemetery" (Answer Brief at 4).

In its reply brief at pages 3-4, appellant responds:

> The (Area Director] argues that [appellant has] "no governmental jurisdiction" over the "excess real property" and therefore the "excess real property" is not "located within the reservation of

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8/ According to the court in Kansas City, Kansas, "the Wyandottes of Oklahoma[] do not use [the Huron Cemetery] and since their removal to Oklahoma have not used it. They have no interest in maintaining it as a cemetery." 192 F. Supp. at 181.

9/ In support of its argument that 25 CFR 151.2(f) should be applied in this context, appellant states that "although the Secretary has promulgated rules at 41 C.F.R. subpart, 101-47.3, 'reservation' is not defined therein" (Opening Brief at 4). The cited regulations were promulgated by the GSA Administrator, not by the Secretary.

> [appellant]." This interpretation would make PL 93-599 a nullity except for tribes in Oklahoma. In enacting PL 93-599, Congress had to know that tribes would never have "governmental jurisdiction" over federal lands even when those lands were located within the reservation boundaries of an Indian tribe. [10/; emphasis in original.]

It is questionable whether any part of 25 CFR Part 151, "Land Acquisitions," was intended to apply to transfers of excess Federal real property under section 483(a)(2). The great majority of the provisions of Part 151 are, on their face, inapplicable to the mandatory transfers described in section 483(a)(2). Rather, they describe policies and procedures for discretionary land acquisitions under various statutes. Further, although a number of statutes are listed in Part 151 as being implemented or interpreted by that part, section 483(a)(2) is not one of those statutes. This is true even though section 483(a)(2) was in existence at the time Part 151 was promulgated and thus presumably would have been included in the list had BIA intended to implement it in that part. It is also worthy of note that, in enacting section 483(a)(2), Congress directed the Administrator of GSA, not the Secretary of the Interior, to prescribe the procedures for the transfers covered by the statute.

Even if all or some portion of Part 151 is applicable to transfers under section 483(a)(2), the part makes it clear--if there were any doubt about the matter--that statutory provisions prevail over the provisions in the regulations. E.g., 25 CFR 151.3 (a): "Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe * * *"; 25 CFR 151.2 (f): "Unless another definition is required by the act of Congress authorizing a particular trust acquisition, 'Indian reservation' mans * * *." Thus, the definition of "Indian reservation" in 25 CFR 151.2(f) must give way to the provisions of section 483(a)(2) to the extent there is any inconsistency between the two.

The Board concludes that it need not determine here whether any portion of 25 CFR Part 151 applies to the transfer of excess Federal real property to Indian tribes. Even if 25 CFR 1.51.2(f) is applicable here, as appellant contends, appellant fails to show that the Kansas property is located within its reservation under the definition of "reservation" in that regulation.

The question under the first part of the definition in section 151.2(f) is not, as appellant suggests, whether appellant could have exercised governmental jurisdiction over the particular piece of property that constituted the United States Post Office and Courthouse located in Kansas City, Kansas; the question is whether there is a geographic area in Kansas over which appellant "is recognized by the United States as having governmental

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10/ It is doubtful that, in enacting section 483(a)(2), Congress had in mind any part of the definition of "reservation" in 25 CFR 151.2(f), since that regulation was first promulgated in 1980. See 45 FR 62036 (Sept. 18, 1980).

jurisdiction." Appellant has not even alleged that it has--much less that it is recognized by the United States as having--such jurisdiction. The Board concludes that, with the possible exception of the Huron Cemetery, appellant has not shown that it has a reservation in Kansas under that part of 25 CFR 151.2(f) which provides that a reservation is that area of land over which a tribe is recognized as having governmental jurisdiction.

The second part of the definition in 25 CFR 151.2(f) applies in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished. There is no dispute that the Kansas property is not located in Oklahoma, and appellant does not allege that there has been a final judicial determination that a Wyandotte reservation in Kansas has been disestablished or diminished.

The Board holds that appellant has failed to show that the Kansas property is located within its reservation under the definition of "reservation" in 25 CFR 151.2(f).

Although not entirely clear, it appears that appellant may also intend to argue that the definition of "Indian country" in 18 U.S.C. § 1151 should be used as a definition of "reservation" for purposes of section 483(a)(2). With the omission of an exception dealing with intoxicating liquors, 18 U.S.C. § 1151 provides that "Indian country,"

> as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. [11/]

The Indian Child Welfare Act of 1978 demonstrates that Congress knows how to use the definition of "Indian country" in 18 U.S.C. § 1151 as a definition for "reservation" under another act when it intends the newer act to have a broad application. 25 U.S.C. § 1903(10) defines "reservation" to "mean[] Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." See also 12 U.S.C. § 4702(11).

Appellant has not cited any authority which, in the absence of express Congressional incorporation of 18 U.S.C. § 1151's definition of "Indian

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11/ For a general discussion of the evolution and meaning of 18 U.S.C. 1151, see Cohen's Handbook 34-44.

country," has equated that definition with "reservation" in any other legislation, including section 483(a)(2).

Appellant has also not attempted to show how any land it claims in Kansas falls within 18 U.S.C. § 1151's definition of "Indian country." The extensive tract appellant claims is not "under the jurisdiction of the United States Government" and is not a "dependent Indian community." 12/ Giving appellant the benefit of an argument it failed to make, even though the Huron Cemetery is not held for an Indian individual(s), it is perhaps arguable that it is, or should be considered, an "Indian allotment." 13/ It might also be argued that the cemetery is an "informal reservation" under cases such as Oklahoma Tax Commission v. Sac & Fox Nation, 113 S.Ct. 1985, 1991 (1993).

However, even assuming that the Huron Cemetery meets the definition of "Indian country" in 18 U.S.C. § 1151, and that section 1151's definition of "Indian country" should be used to define "reservation" in 40 U.S.C. § 483(a)(2), this does not assist appellant. The main part of section 483(a)(2) requires that the excess Federal property be located "within" a reservation. Because the Kansas property is not located "within" the Huron Cemetery, it would not be eligible for transfer under the main part of section 483(a)(2). 14/

To the extent that appellant may be arguing for the application of the definition of "Indian country" in 18 U.S.C. § 1151 in determining what constitutes a "reservation" for purposes of section 483(a)(2), the Board both rejects the argument and finds that the argument would, in any case, not be of benefit to appellant.

Appellant also argues that it still has a reservation in Kansas because it was "not paid for [the] reservation lands nor was the reservation opened to non-Indian settlement by a surplus land act" (Opening Brief at 15). Appellant contends that when the lands in Kansas were allotted to individual tribal members, who later sold the lands, "the reservation boundaries surely * * * survived the tribe's loss of title to most of the land therein, at least, for the purposes of [40 U.S.C. § 483(a)(2)]." Id.

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12/ See Cohen's Handbook 776: "Dependent Indian communities have been judicially defined as tribal Indian communities under Federal protection." See United States v. McGowan, 302 U.S. 535, 538-39 (1938); United States v. Sandoval, 231 U.S. 28, 46-48 (1913).

13/ See Cohen's Handbook 40: "The term 'Indian allotment' has a reasonably precise meaning, referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation."

14/ As was noted supra, appellant alleged that it was entitled to receive the Kansas property because it was "contiguous to" the Huron Cemetery. Only the proviso of section 483(a)(2) authorizes the transfer of excess Federal property "contiguous to" real property presently held in trust. The Board has already concluded that the proviso applies only to excess Federal property located in Oklahoma.

The Board initially notes that appellant was probably not paid for the lands once held in Kansas because those lands were ceded to the United States and reconveyed in fee simple to tribal members in accordance with the 1855 Treaty. Under the 1850 Treaty, the tribe was paid $185,000 for relinquishing its claim to a 148,000-acre reservation. Although the Board researched the docket of the Indian Claims Commission, it found no case in which appellant sought compensation, or an adjustment of compensation received, in regard to either of those transactions.

Appellant's statement that the Kansas lands were not opened through a surplus lands act apparently refers to the fact that reservations opened to non-Indian settlement were often deemed to have been thereby terminated or diminished. As the Board noted in Citizen Band Potawatomi, several such reservations have been the subject of Supreme Court decisions concerning their present-day status. The Board stated that "[t]ypically, these cases revolve around statutes which * * * provided for allotments to tribal members and opened the 'surplus' lands of the reservation to settlement by non-Indians. The usual question is whether a particular statute diminished or 'disestablished' a reservation" (28 IBIA at 181). See, e.g., Hagen v. Utah, 114 S.Ct. 958 (1994); Solem v. Bartlett, 465 U.S. 463 (1984). If all the Wyandotte lands in Kansas were conveyed to tribal members, there would have been no "surplus" lands, and thus no reason for Congress to enact a surplus lands act. Therefore, the fact that no such statute was enacted is of no particular consequence.

[3] Appellant does not contend that it presently occupies a reservation in Kansas. Instead, its claim is based on the alleged continued existence of a reservation which is not recognized by either the Department of the Interior or the courts; 15/ which was conveyed to individual tribal members in the 1850's; and, with the exception of the Huron Cemetery, none of which is alleged to be held in trust by the United States for appellant or any of its members. Under these circumstances, appellant can only be arguing that it has a "former reservation" in Kansas. 16/ Assuming that appellant has a "former reservation" in Kansas, the Board believes

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15/ Only four tribes have been recognized as having reservations in Kansas, those tribes being the Iowa, Kickapoo, Potawatomi, and Sac and Fox. See Oyler v. Allenbrand, 23 F.3d 292 (10th Cir. 1994).

16/ See appellant's statement at page 4 of its reply brief that the Kansas property "is located within the boundaries of the former Wyandotte Reservation."

For purposes of this discussion, the Board gives the term "former reservation" the meaning suggested by appellant, i.e., lands formerly held in trust for an Indian tribe, but which have passed out of Indian trust ownership, and perhaps out of Indian ownership altogether.

Because it is not necessary to the resolution of this case, the Board expresses no opinion as to whether or not appellant has a "former reservation" in Kansas, as that term has traditionally been used by Congress, the courts, and the Department.

the relevant question is whether Congress intended to include "former reservations" within the meaning of "reservation" in the main part of section 483(a)(2). 17/ To answer this question, the Board again turns to the legislative history of H.R. 8958.

The House report on H.R. 8958 states: "Under existing law, Indians residing on reservations are governed under a trustee arrangement administered by the Secretary of the Interior through the Bureau of Indian Affairs" (H.R. Rep. No. 1339, 93d Cong., 2d Sess. 3 (1974)); and

> In the view of the committee, no other applicant would appear to have as great a right of possession of land located within a reservation as the Indians located thereon. For that reason, whenever property within a reservation becomes excess to other Federal needs, H.R. 8958 makes it mandatory that GSA convey such land to the Department of the Interior to be held in trust by it for such use as the Indian tribe located on the reservation believes best.

Id. at 4.

The floor debates in the House similarly demonstrate an intention that excess Federal property be transferred to the tribe occupying a reservation. Representative Stanton stated: "[W]hen Federal Government property located within the boundaries of an Indian reservation is no longer needed by the Federal Agency using it, the property would pass to the Department of the Interior to hold in trust for the benefit of the Indian tribe on the reservation"; "[W]hen Federal property becomes excess or surplus, it may be passed on to third parties who may use the property for purposes inconsistent with the activities of the Indian tribe"; "The amount of property * * * is significant in terms of what it means to the Indian tribes whose reservations would be affected by the intrusion of unrelated activities" (all quotations from 120 Cong. Rec. 36249 (1974)). These comments were echoed by Representative Buchanan: "H.R. 8958 will permit the transfer of excess or surplus Federal property located within an Indian reservation to the Department of the Interior for the benefit of Indian tribes occupying the reservation." Ibid. The Senate report on H.R. 8958 is equally clear:

> Under existing law, Indians residing on reservations are governed under a trustee arrangement administered by the Secretary of the Interior through the Bureau of Indian Affairs.
>
> When federally-owned land located within a reservation is declared excess to the needs of an agency using the land,

_____

17/ As has been discussed, the proviso of section 483(a)(2) clearly and specifically applies to those lands traditionally called "former reservations" in Oklahoma.

> Indians on that reservation do not have preferential rights in obtaining the property.
>
> * * * * * *
>
> H.R. 8958 makes it mandatory that GSA convey excess land located within a reservation to the Secretary of the Interior to be held in trust for such use as the Indian tribe located on the reservation believes best.

S. Rep. 1324 at 1-2, 1974 U.S. Code Cong. & Admin. News at 7130-31. See also 120 Cong. Rec. 39398-99 (1974).

In reviewing the purpose of H.R. 8958 after receiving the Senate amendment, Representative Brooks stated that the bill "provide[s] that surplus Government property located within the boundaries of Indian reservations be transferred to the Secretary of the Interior to hold in trust for the Indians occupying the reservation." 120 Cong. Rec. 40176 (1974).

It thus appears from remarks made in both Houses during consideration of H.R. 8958 that Congress intended the main part of the bill to apply to reservations on which Indian tribes were presently residing, i.e., current reservations. The addition of the proviso strengthens this interpretation. As is evident in the legislative history of the proviso reviewed surpa, Congress, in the belief that Indian tribes in Oklahoma had no current reservations, found it necessary to legislate specifically for them in order to ensure that they were not excluded from the benefits of the property transfer authorization.

It also appears that Congress, during the second session of the Ninety-Third Congress, knew the term "reservation" had a specific meaning which did not include all lands held in trust for Indian tribes or individuals, and furthermore knew how to expand the definition of "reservation" when it so intended. The Indian Financing Act of 1974 was enacted on April 12, 1974. It defines "reservation" at 25 U.S.C. § 1452(d) to "include[] Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. §§ 1601-1629e]." The Native American Programs Act of 1974, Title VIII of the Economic Opportunity Act of 1964, defines “Indian reservation or Alaska Native village” at 42 U.S.C. § 2992c(2) to

> include[] the reservation of any federally or State recognized Indian tribe, including any band, nation, pueblo, or rancheria, any former reservation in Oklahoma, any community under the jurisdiction of an Indian tribe, including a band, nation, pueblo, or rancheria, with allotted lands or lands subject to a restriction against alienation imposed by the United States or a State, and any lands of or under the jurisdiction of an Alaska Native village or group, including any lands selected by Alaska Natives

or Alaska Native organizations under the Alaska Native Claims Settlement Act. [18/]

Although appellant could argue that these acts and section 483(a)(2) show the same misunderstanding of the status of Indian lands in Oklahoma, such an argument would not detract from the fact that the latter acts also show that the same Congress which passed section 483(a)(2) knew that "reservation" was not an all-inclusive term for Indian trust or restricted lands, and knew how to expand the definition of "reservation" to include additional Indian lands, including "former reservations," when it intended a statute to have a broad application. 19/

Based on its review of the legislative history of H.R. 8958 and other contemporaneous legislation, the Board concludes that Congress intended the main part of section 483(a)(2) to apply to current reservations.

Given the expression of Congressional intent that, except in the State of Oklahoma, section 483(a)(2) was to apply when excess Federal property was located on current reservations, the Board finds that because appellant does not occupy a current reservation in Kansas, it does not have a "reservation" in Kansas within the meaning of section 483(a)(2).

The Board rejects appellant's argument that it is eligible to receive the Kansas property under the main part of section 483(a)(2).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 27, 1995, decision of the Muskogee Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

18/ The Native American Programs Act of 1974 was under consideration in both the House and the Senate at the same time as section 483(a)(2). Section 483(a)(2) was considered by the House on Nov. 18 and Dec. 16, 1974; and by the Senate on Dec. 12 and 18, 1974. The Native American Programs Act was considered by the House on May 29 and Dec. 20, 1974; and by the Senate on Dec. 13 and 19, 1974.

19/ Other acts also include expanded definitions of "reservation." See, e.g., 7 U.S.C. § 5930 note; 22 U.S.C. § 2124c(m)(1); 25 U.S.C. §§ 2902(8), 3202(9), and 3501(2); and 42 U.S.C. § 1973aa-la(b)(3)(C).